Supreme Court, U. S.
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No. 80-358

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

NORMAN J. STRICOF,
Petitioner,

-VS-

LORRAINE C. STRICOF,
Respondent.

RESPONSE AND ANSWER IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

The questions presented to this Court by Petitioner not only were not presented to the Michigan courts and hence not preserved, but also avoid the real issue. The real issue is whether or not the Michigan courts did consider the Plaintiff's potential tax liabilities in the property division. Accordingly, this counter-question.

QUESTION I

WHETHER THE MICHIGAN COURTS CONSIDERED PLAINTIFF'S TAX LIABILITIES IN THE PROPERTY DIVISION?

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COUNTER STATEMENT OF THE CASE

The parties were married in December, 1948, when Petitioner was 22 and Respondent was 20 years of age. At the time of trial there were no minor children of the marriage.

At the trial of the cause there were four expert witnesses. First there was Petitioner himself who is a certified public accountant. In addition there were Petitioner's expert witness, Orville V. Lefko, C.P.A., and Respondent's expert witnesses, David Desow, C.P.A., and Abraham Burnstein, C.P.A.

Based on the testimony and exhibits, the judgment entered in the trial court on March 12, 1976, made the following dispositions relative to alimony and property:

The Judgment

1. The judgment *awarded Respondent* the following properties:

(a) The marital home, and furnishings therein.

(b) 1971 Ford automobile.

(c) U.S. Savings Bonds.

(d) Marketable securities and bonds.

(e) A right to receive the first $33,040.00 paid to Petitioner on Petitioner's 15% interest in Shellco Investment Co.

(f) Chemical Bank account of $80,000.00.

(g) Petitioner's interest in Texas International Drilling Co.

(h) Petitioner's one-sixth (1/6th) interest in Paint Creek Golf & Country Club.

(i) Three life insurance policies on Petitioner's life.

(j) The right to receive 50% of amounts paid to Petitioner on Petitioner's 27½% interest in Frenchtown Convalescent Center, Inc., and its

related entity, FCC Properties, with a maximum limit of $135,000.00, the amount so received by Respondent to be taxable alimony to her and deductible by Petitioner.

(k) The right to receive 50% of amounts paid to Petitioner on Petitioner's 20% interest in Van Buren Convalescent Center, Inc., and its related entity, Van Buren Properties, with a maximum limit of $170,000, the amount so received by Respondent to be taxable alimony to her and deductible by Petitioner.

2. The judgment *awarded Petitioner* the following properties:

(a) Petitioner's interest in Stricof & Polk, P.C.

(b) Certain camera equipment, furniture, and filing cabinets.

(c) 1975 Oldsmobile automobile.

(d) Stricof & Polk, P.C., retirement trust funds.

(e) Life insurance policies.

(f) Greenfield North co-partnership and land contract.

(g) Petitioner's interest in World Computer Corp.

(h) Petitioner's 15% interest in Shellco Investment Co.

(i) All bank accounts, excepting Chemical Bank which was awarded to Respondent.

(j) Petitioner's interest in Big Rapids Building Co.

(k) Petitioner's interest in Regency Park Apartments.

(l) Petitioner's 27½% interest in Frenchtown Convalescent Center, Inc., and FCC Properties.

(m) Petitioner's interest in Van Buren Convalescent Center, Inc., and in Van Buren Properties.

(n) $6,971.19 form 1974 Federal Income Tax refund.

3. The trial court also ordered Petitioner to pay from the total 1974 Federal Income Tax refund of $33,971.19 the sum of $22,000.00 to the Respondent's attorney, and the sum of $5,000.00 to David Desow, C.P.A., one of Respondent's expert witnesses. (The Michigan Court of Appeals reversed this disposition and award of fees, and ordered the refund of $33,971.19 to be divided equally between the parties.)

4. Alimony of $3,000.00 per month was awarded to Respondent, the judgment expressly providing that such amount was based upon the Petitioner's having an income between $75,000.00 and $100,000.00 per year. The judgment also provided that so long as Petitioner has an alimony obligation, he shall maintain Respondent as named beneficiary on $200,000.00 life insurance.

5. With regard to taxes, in addition to the specific provisions relative to proceeds to be paid to Respondent from Frenchtown and Van Buren, the judgment specifically stated that "each party hereto shall be responsible for his and her own tax liability incurred by reason of this property settlement on the property each received." (The Michigan Supreme Court, however, remanded for reconsideration in light of Petitioner's "clear tax liability that arises out of the undisputed fact that the nursing home properties had negative bases of $70,000 and $127,000 at the time of the trial." (58a) This refers to FCC Properties and Van Buren Properties, 2(l) and (m) above.)

Petitioner's complaints on appeal, and to this Hororable Court, relate to tax problems. Petitioner's claims are based on the testimony of his expert witness, Orville Lefko, C.P.A. The trial court, however, made the following findings regarding Lefko:

> "As to the tax liabilities about which plaintiff's expert Lefkos [sic] testified, this Court has discounted those purported tax liabilities for two reasons. First, those purported tax liabilities were calculated based on transfers of

those properties in 1974, none of which were ordered and none of which have yet occurred. Further, those tax calculations were not supported by adequate foundation as to rates, deductions, or other details necessary to the calculations. (Transcript of March 27, 1975, p. 33-34, 36.)

"Secondly, and more importantly, in this Court's eyes, witness Lefkos [sic] lacked credibility. His testimony that plaintiff's likely future earnings would not exceed $40,000 per year, in the face of plaintiff's own testimony that he had averaged $100,000 per year over the previous five years, was completely incredible and patently contrived. In light of Lefkos' [sic] obvious falsehood as to plaintiff's income, this Court chose to disbelieve and ignore Mr. Lefkos' [sic] testimony on all points."

Petitioner now claims that because the Michigan Supreme Court remanded for review because of undisputed negative bases on two parcels of real estate, somehow or other witness Lefko has been totally rehabilitated and all of his testimony must now be accepted as gospel.

JURISDICTION

Petitioner seeks writ of certiorari to the Michigan Court of Appeals. It should be noted, however, that the Michigan Court of Appeals is the intermediate appellate court for the State of Michigan. After the Michgian Court of Appeals delivered its final opinion and order on March 7, 1979, Petitioner sought relief in the Michigan Supreme Court, which is the highest appellate court in the State of Michigan. This resulted in the order of April 4, 1980, from the Michigan Supreme Court, denying Petitioner leave to appeal, but remanding to the trial court to reconsider the matter "in light of the plaintiff's clear tax liability that arises out of the undisputed fact that the nursing home properties had negative bases of $70,000 and $127,000 at the time of the trial." (58A) In all other respects, Petitioner's application for leave to appeal to the Michigan Supreme Court was denied.

Consequently, at this time, there is not a full, complete and final decision form the courts of the State of Michigan, with regard to Petitioner's complaint to this Honorable Court, that is, that the Michigan courts refused to consider Petitioner's potential tax liabilities in the property division.

REASONS FOR NOT GRANTING THE WRIT

I. PETITIONER'S STATEMENT OF QUESTIONS INVOLVED PRESENTS ISSUES WHICH WERE NOT PRESENTED TO THE MICHIGAN COURTS AND WERE NOT PRESERVED.

The questions presented by Petitioner all deal with the manner in which property divisions made by state courts in divorce cases should treat various aspects of the property division form technical tax statute applications and interpretations. At the appellate levels in the State of Michigan, both in the intermediate Court of Appeals, and in the Supreme Court, Plaintiff complained that the trial court had failed to consider Plaintiff's tax liabilities in the property division. Ultimately,

the Michigan Supreme Court agreed with Petitioner to the extent of remanding, per its order of April 4, 1980, to the trial court to reconsider the matter with regard to Petitioner's negative bases on two nursing home properties. (58A)

What Petitioner is now presenting to this Court, is not the question of whether or not the Michigan courts considered Petitioner's tax liabilities, but the manner in which such was considered and decided by the Michigan courts.

Petitioner complains (Question I) that because a trial court labels certain payments as "alimony", that does not ipso facto make them alimony within the meaning of the Internal Revenue Code. What Petitioner fails to realize is that the Michigan courts have determined that they want certain monies paid over to Respondent, regardless of the tax consequences.

Further, Petitioner complains (Question II) that appreciated property cannot be transferred from Petitioner to Respondent without Petitioner incurring tax liability on the transfer.

Petitioner complains (Question III) that certain tax consequences of the property division are not speculative.

It is clear that these issues of how the Michigan courts ruled, are not the same issue as whether the Michigan courts gave consideration to these tax matters.

II. THE MICHIGAN COURTS DID GIVE CONSIDERATION TO PETITIONER'S TAX CONSEQUNECES.

It is clear from the remand to the trial court from the Michigan Supreme Court, that the basis for such was consideration of Petitioner's tax situation. The remand was to reconsider disposition of two nursing home properties, in light of Petitioner's negative bases thereon. This remand hearing has not yet been held.

Further, it is equally clear from the first and second opinions in the Michigan Court of Appeals (34a and 51a) that the Michigan Court of Appeals gave consideration to Petitioner's tax consequences.

Upon remand to the trial court, it also gave consideration to Petitioner's tax consequences, as set forth in the above quote from the trial court's opinion on remand. In its first opinion, the Michigan Court of Appeals posed ten questions and remanded to the trial court for hearings, proofs, and answers. Among those ten questions were the following:

> "(1) Did the trial court consider all of the tax consequences toward the parties in reaching its conclusion, particularly with regard to accounts receivable and goodwill?" (36a)
>
> "(7) Can the trial court properly term the property settlement alimony. See judgment at 4." (38a)

At the remand hearing, Petitioner offered *no* additional proofs on any aspect of the case. The trial court answered the above quoted questions as follows:

"This Court did not consider all of the tax consequences to the parties in reaching its division of property. To the extent that expert testimony incorporated tax consequences, this Court did consider that factor. In the evaluation of Stricof & Polk, C.P.A., P.C., this Court did not evaluate accounts receivable. Since receivables might never be paid, they are mere expectancies that could not be known as a value. This Court said as much on March 12, 1976. (Transcript of 3-12-76, p. 19-20) Good will was considered as part of the value of the C.P.A. firm.

"This Court expressly ordered in its judgment that 'each party hereto shall be responsible for his and her own tax liability incurred by reason of this property settlement on the property each received.' (Judgment, III.G., p. 7.) Therefore, this Court accounted for and distributed the tax liabilities that were part of the marital estate.

"As to the tax liabilities about which plaintiff's expert Lefkos [sic] testified, this Court has discounted those purported tax liabilities for two reasons. First, those purported tax liabilities were calculated based on transfers of those properties in 1974, none of which were ordered and none of which have yet occurred. Further, those tax calculations were not supported by adequate foundation as to rates, deductions, or other details necessary to the calculations. (Transcript of March 27, 1975, p. 33-34, 36.)

"Secondly, and more importantly, in this Court's eyes, witness Lefkos [sic] lacked credibility. His testimony that plaintiff's likely future earnings would not exceed $40,000 per year, in the face of plaintiff's own testimony that he had averaged $100,000 per year over the previous five years, was completely incredible and patently contrived. In light of Lefkos' [sic] obvious falsehood as to plaintiff's income, this Court chose to disbelieve and ignore Mr. Lefkos' [sic] testimony on all points.

"Therefore, there was no other testimony upon which this Court could have considered these speculative imaginary tax consequences." (43a - 44a)

* * *

"In response to this question the Court points out that the term 'alimony' under Judgment III.B. and III.C. was inserted not by this Court, but during a recess of court by the mutual agreement of the parties. This Court acquiesced in the use of that terminology, but did not order it and did not give its express approval of that specific language.

"It is standard practice to try to frame divorce degrees and property divisions in a manner that will afford the parties some tax benefit. The Internal Revenue Code provisions regarding alimony provide that periodic payments which last over a period of ten years, or which are not installments on a fixed sum in gross, shall be treated as alimony.

"These payments are not tied to any sum in gross (except that there are maximum dollar amounts specified) and the period during which the payments must be made is indefinite; it is neither more than, nor less than, ten years. Thus, the payments fit the statutory definition and should be treated for tax purposes as alimony." (47a - 48a)

The significance of the trial court's findings regarding the use of "alimony" in the judgment can only be appreciated by an examination of Page 4 of the original judgment at III.B. and III.C., a copy of which Page 4 is attached as Exhibit "A". (The entire judgment is at (7a).) It is clear that "alimony" has been inserted by pen in two places. Petitioner cannot now be heard to complain about this form of the judgment when it was arrived at by mutual agreement.

Thereafter, the matter was again in the Michigan Court of Appeals, which rejected Petitioner's contentions. The Michigan Court of Appeals ruled as follows with regard to the Petitioner's tax consequences concerning the nursing homes:

> "The first question which we directed the trial court to answer dealt with the court's consideration of tax consequences. In its opinion on remand, the court stated that tax consequences had been considered, to the extent incorporated by the expert testimony; however, plaintiff's expert lacked credibility because he had testified untruthfully. In addition, this witness had not specified the foudational facts for his calculations, and had made his calculation based on transfers of property which had not yet occurred and had not been ordered. Finally, the court stated that the general principle which had guided the court's division was that each party should be responsible for his or her own tax liabilities on property awarded in the settlement.
>
> "We can find no fault with the above findings. The trial court has wide discretion in dividing the property of the marital estate, and in deciding which witnesses are worthy of belief. *Irish* v *Irish,* 59 Mich App 635, 636; 229 NW2d 874 (1975). The court must consider tax consequences in general, but is not required to consider speculative, imaginary tax consequences of transfers which may never occur. See *Wahl* v *Wahl,* 39 Wis 2d 510; 159 NW2d 151 (1968). The situation here is analagous to that where an employee's interest in a pension fund is a mere expectancy: such an interest is not distributable pursuant to a divorce judgment. *Miller* v *Miller,* 83 Mich App 672; NW2d (1978). *United States* v *Davis,* 370 US 65; 8 L Ed 2d 335; 82 S Ct 1190 (1962), relied on by the plaintiff, is not on point because in that case the transfers had already taken place. In the case at bar, all our opinion asked was whether the court had taken the tax consequences into consideration, and we are now satisfied that this was done." (52a)

Further, the Michigan Court of Appeals ruled as follows with regard to Petitioner's argument of tax consequences and the application thereof to the alimony provision:

> "On remand, this Court asked, first, whether the trial court could term the property settlement 'alimony.' The trial court responded that the word 'alimony' was added by mutual agreement of the parties. Plaintiff has not disputed this statement in his brief. The law favors compromises and settlements, and the court is ordinarily powerless to disturb the terms of a stipulation entered into by the parties as to the division of property. See *Shahan* v *Shahan,* 74 Mich App 621; 254 NW2d 596 (1977), *Dillard* v *Dillard,* 356 Mich 394; 96 NW2d 801 (1959). We find no error." (53a-54a)

It should be noted that Petitioner's complaint is not directed toward the tax implications on Petitioner with regard to the transfer of the marital residence and the stocks and bonds to Respondent. Rather, Petitioner's complaint is directed to the obligation in the judgment of divorce that Petitioner pay Respondent 50% of the monies received by Petitioner on two properties, up to $135,000.00 on Frenchtown Convalescent Center, and up to $170,000.00 on Van Buren Convalescent Center. These are maximum limits, only to be paid in the event of a "sale or other diminution" of Petitioner's interest therein. When these events might occur, if ever, is totally speculative and uncertain. Consequently, it is equally speculative and uncertain as to what the tax implications of these payments to Respondent at some future uncertain and unknown date might be. This is especially true in light of inflation, Petitioner's possible death and a stepped-up basis, and future changes in the tax laws.

Further involved in this question is the matter of the actual valuation of the nursing homes. The trial court, and the Michigan Court of Appeals, chose to reject as not believable the testimony of Petitioner's expert witness Lefko concerning valuation of the nursing homes. They chose to believe, on the contrary, the testimony of Respondent's expert witnesses.

Aside from having discredited himself by his testimony concerning Petitioner's annual income, and by his testimony concerning the valuation to be placed upon Petitioner's partnership interest in his accounting firm, Petitioner's expert witness Lefko testified concerning the value of Petitioner's interest in the nursing homes as follows: That Petitioner's 20% (25% at entry of judgment) interest in Van Buren was $13,627.00; and that Petitioner's 27½% interest in Frenchtown was $9,223.00. On the other hand, Respondent's expert witness Desow testified that Petitioner's minority interest in Van Buren was worth $302,000.00, and in Frenchtown $256,500.00, after giving consideration to the mortgages and liabilities on these properties. Further, Respondent's expert witness Burnstein testified that the gross value of Van Buren was in the range of $2,000,000.00 to $2,600,000.00, and that the gross value of Frenchtown was in the range of $2,700,000.00. The trial court determined that the gross value of Van Buren was approximately $2,250,000.00, and Van Buren approximately $2,300,000.00, recognizing Plaintiff's minority interest in Frenchtown was 27½%, and in Van Buren 20% at the time of trial and 25% at the time of entry of judgment.

Mr. Burnstein had particular experience with nursing homes, and had closed a sale of a nursing within ten days prior to his testimony. His method of valuation was to place a value on a per bed basis. Mr. Burnstein was the only appraiser actually to visit the property he was valuing.

Confronted by these conflicting valuations, and questions of mortgages and liabilities, of Petitioner's minority interest in these properties, of Petitioner's restricted ability to transfer any interest in these properties to Respondent (and consequently of the court's restricted ability to transfer any interest in these properties to Respondent), and of inflation, and of the uncertainty of when, if ever, Petitioner might realize any monies from these properties, the trial court simply ordered that Petitioner share in the fruits of these two properties in the amounts shown above, up to a maximum.

Petitioner now seizes upon one aspect of this case, that is, future tax potential, and in effect urges that under all the circumstances the trial court, as well as the Michigan appellate courts, abused their discretion.

III. PETITION FOR WRIT OF CERTIORARI IS PREMATURE.

As noted above, this case has not yet reached its full and final disposition in the Michigan courts. The case is still on remand from the Michigan Supreme Court to the trial court. No decision has yet been made in the trial court, and in fact no remand hearing has yet been held on the issues of the negative tax bases. Consequently, until such time as the Michigan courts have reached a final conclusion, Petitioner's request for relief in this Honorable Court is in the nature of an interim appeal.

RELIEF SOUGHT

WHEREFORE, LORRAINE C. STRICOF, Respondent, prays that the petition for writ of certiorari be denied, and that Respondent be awarded court costs and attorney fees.

Respectfully submitted,

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Dated: November 10, 1980.

EXHIBIT "A"

husband's 27-1/2% interest in Frenchtown Convalescent Center, Inc., a Michigan corporation, and its related entity, FCC Properties, a Michigan co-partnership.

The intent of the foregoing language is to award defendant wife fifty per cent (50%) of the amount received or benefited to plaintiff husband from payments of principal, capital, income or otherwise, including any amount received by plaintiff husband upon a sale or other diminution of his interest therein, with a maximum limit of $135,000.00 to be paid to defendant wife under this provision.

The interest of plaintiff husband at date of judgment in the aforesaid corporation and partnership is 27-1/2%.

The amounts so received by defendant wife shall be ALIMONY ~~allowed~~ taxable to her and deductible by plaintiff husband.

The payments to defendant wife shall be made to her by plaintiff husband within 10 days after receipt by him of the money or benefits. 50% of any such receipts by husband from November 6 1975 to date of this judgment shall be paid to defendant wife within 30 days of this judgment.

C. IT IS FURTHER ORDERED AND ADJUDGED that defendant wife shall receive as her sole and separate property 50% of the amounts paid to plaintiff husband, from on account of plaintiff husband's 20% interest in Van Buren Convalescent Center, Inc., and in Van Buren properties (a co-partnership).

The intent of the foregoing language is to award defendant wife 50% of the amount received or benefited to the plaintiff husband by way of principal, capital, income or otherwise, including any amounts received by plaintiff husband upon a sale or other diminution of his interest therein with a maximum of $170,000.00 to be paid to defendant wife under this provision.

The interest of plaintiff husband at date of judgment is 20%.

The amounts so received by wife shall be ~~considered~~ taxable AS ALIMONY AND